

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No 284 of 1997

in

COMPANY PETITION No 121 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE H.L.GOKHALE Sd/-

=====

1. Whether Reporters of Local Papers may be allowed
to see the judgements? Yes

2. To be referred to the Reporter or not? Yes @@ef
rred to the Reporter or not? Yes @@eferred to the Reporter or
not? Yes @@eferred to the Reporter or not? Yes
@@eferred to the Reporter or not? Yes @@eferred to the Repo
ter or not? Yes @@eferred to the Reporter or not? Yes
@@eferred to the Reporter or not? Yes @@eferred to t
e Reporter or not? Yes @@eferred to the Reporter or not? Yes
@@eferred to the Reporter or not? Yes @@eferr
d to the Reporter or not? Yes @@eferred to the Reporter or no
? Yes @@eferred to the Reporter or not? Yes
@@eferred to the Reporter or not? Yes @@eferred to the Reporte
or not? Yes @@eferred to the Reporter or not? Yes
@@eferred to the Reporter or not? Yes @@eferred to the
eporter or not? Y

3. Whether Their Lordships wish to see the fair copy
of the judgement? No

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge?
No

Y.S. SPINNERS LIMITED

Versus

O.L. OF AMBICA MILLS LTD.

Appearance:

MR KS NANAVATI with MR CHUDGAR for Petitioner

MR ASHOK L SHAH for Respondent No. 1

MR DS VASAVADA for TEXTILE LABOUR ASSOCIATION

CORAM : MR.JUSTICE H.L.GOKHALE

Date of decision: 30/12/98

ORAL JUDGEMENT

Company Petition No.66 of 1988 was filed on 12th April 1988 for winding-up Shri Ambica Mills Ltd. This was one of several petitions filed for this purpose. During the pendency of that petition, Reference under Sick Industrial Companies (Special Provisions) Act 1985 was filed before the Board of Industrial & Financial Reconstruction (BIFR). The Board forwarded its opinion to this court under Section 20 of the said Act to the effect that it was just and equitable that the company be wound up. The opinion from the said Board was registered as Company Petition No.121 of 1995 and winding-up order came to be passed on 17.1.1997 on Company Petition No.66 of 1988 with Petition No.121 of 1995 and others. Under that order (Coram: Pandit, J.), the Official Liquidator attached to this High Court was appointed as the Liquidator for that company and the Liquidator was directed to take charge of the company together with all its assets, records, books, machineries, spare parts, stores, manufactured goods, land and buildings and all other properties after taking an inventory in that behalf. The order stated that he will have all the powers prescribed under Sections 456 and 457 of the Companies Act, 1956 and would also be at liberty to seek permission from this court whenever he felt it necessary.

2. Shri Ambica Mills Ltd. is having its properties situated mainly at four different places:

(i) Unit No.1 situated in the Khokra area of Ahmedabad.

(ii) Unit No.2 which is situated near Railway Lines at Ahmedabad.

(iii) A textile mill at Baroda.

(iv) M/s. Ambica Tubes Division at Vatva.

3. In the present Application we are concerned with Unit No.2 which is situated near Railway Lines at

Ahmedabad. The present Application is an application under Section 446 of the Companies Act which seeks leave through prayer (B) to continue to proceed with Civil Suit No.4780 of 1995 filed by the applicant against the company in winding-up on 14.9.1995 in the City Civil Court at Ahmedabad. Alternatively, it is prayed in the later part of the said prayer clause (B) that the said suit may be transferred to this court for proceeding further. For that purpose it is prayed in prayer clause (A) that the Applicant may be permitted to join Official Liquidator as a party in that suit.

4. An affidavit of one Shri P.K.Jain who is described as the Authorised Representative of the applicant company affirmed on 9.7.1997 is filed in support of this Application. Para 1 of the affidavit states that the said suit is filed for recovery of a sum of Rs.23,99,81,507 against Shri Ambica Mills Ltd. (now in liquidation). Para 2 of the affidavit states that a Memorandum of Understanding had been executed on 2.11.1989 and thereafter a supplementary agreement on 6.12.1989 between the Applicant company (which was then known as Y.S.Syntext Projects Ltd.) and Shri Ambica Mills Ltd. (now in liquidation) which provided for purchase of Unit No.2 of Shri Ambica Mills Ltd. by the Applicant for a sum of about Rs.6.2 crores. It is further stated that the Applicant was handed over possession of the said unit on 9.12.1989. In para 3 of the affidavit it is stated that although some four years passed after signing of the aforesaid agreement, Shri Ambica Mills Ltd. was not in a position to transfer any right, title or interest in the said unit No.2 to the Applicant. Later on, the Applicant came to know that Shri Ambica Mills Ltd. had given a 'unilateral' undertaking on 27.5.1997 (the correct date is 27.5.1987) to the Hon.'ble Supreme Court in a dispute pertaining to the dues of ONGC that it would not alienate any of its immovable assets with effect from 15.4.1997 (the correct date is 15.4.1987) except with the leave of that Court. It is stated therefore that the Applicant company rescinded the Memorandum of Understanding and the supplementary agreement dated 2.11.1989 and 6.12.1989 respectively on 24.1.1995 and requested Shri Ambica Mills Ltd. to take back possession of the said Unit No.2. Thereafter, it is stated in para 4 of the application that, in the meanwhile, the said Unit No.2 was closed down on 24.10.1994 due to disconnection of power supply and that the premises came to be sealed by the order of the Labour Court in November 1994 for recovery of workers' dues. In para 5 of the application it is stated that it was in these circumstances that the applicant was constrained to file Civil Suit No.4780 of 1995. It was

thereafter that the winding-up order came to be passed on 17.1.1997 which came to be confirmed on 31.3.1997 in O.J. Appeal No.7 of 1997 filed by another concern, namely, one Sunil Mills Ltd. In para 6 of the application it is stated that the Official Liquidation has taken over possession of Unit No.2 since then.

5. A copy of the aforesaid Civil Suit No.4780 of 1995 is produced in this court. The said civil suit inter alia prays for -

- (a) leave to sue under Order 2 Rule 2 of the Civil Procedure Code;
- (b) a declaration that the agreement/ contract dated 2.11.1989, 6.12.1989 and 9.12.1989 are no longer subsisting and have been lawfully rescinded;
- (c) a declaration that the plaintiff (applicant) is not liable to perform any obligation in or arising out of the said agreements;
- (d) a decree for Rs.18,28,31,901 (which is principally for the expenditure allegedly incurred by the plaintiff on behalf of the company in winding-up);
- (e) an inquiry for compensation and charges for the loss incurred and the damage suffered;
- (f) decree for specific delivery of the plant and machinery and equipments in favour of the applicant
- (g) if delivery of the said items cannot be given, then a decree for a sum of Rs.23,99,81,507 or such an amount as may be deemed by the court.

6. The Official Liquidator initially filed a report on 13.2.1998 being OLR No.35 of 1998. In para 2 of the said report it was stated that the matter was a complicated one involving various questions of fact as well as law and that legal assistance was necessary in the interest of justice to defend the said proceeding. It was, however, stated later on that alternate prayer (B) made in the Application for transfer of the said suit to the High Court may be granted. In para 4 of the report it was stated that ex-directors of the company had violated the undertaking given to the Hon.'ble Supreme Court and hence the ex-directors were personally liable and they should be joined as principal defendants in that

suit. The above-referred Mr.Jain thereafter filed another affidavit giving names of these ex-directors who are Jayakrishna Harivallabhadas (Chairman and Managing Director) and 8 others. The Official Liquidator, however, subsequently took legal advice and filed a further report on 15.12.1998 stating that the earlier report was without any legal assistance and having received legal advice, the O.L. submitted that the Company Application cannot be and should not be granted. The O.L. has filed one more affidavit on 21.12.1998 producing therewith following documents:

Exh.A - Photocopy of the Minutes of Extraordinary
General meeting of the Company held on 30.3.1989;

Exh.B - A copy of Form No.23 along with the
Resolution passed in the above meeting under
Section 293 (1) (a) of the Act which were
forwarded to the Registrar of Companies and the
Explanatory Statement annexed therewith pursuant
to Section 173 of the Act.

In para 4 of this affidavit, it is stated that the said Explanatory Statement did not disclose to the share holders the very material facts inasmuch as it did not at all disclose even the existence of the injunction/prohibitory order dated 15.4.1987 directing that the company shall not charge, encumber or alienate any of its immovable assets except with the leave of the Supreme Court and that the company shall make its immovable assets available for discharge of its liabilities to the ONGC. The said Explanatory Statement also did not disclose that the company had accordingly given an undertaking to the Hon.'ble Supreme Court, that it shall not charge, encumber or alienate its immovable assets except with the leave of the Supreme Court and that it shall make available its immovable assets for discharging the liabilities of ONGC that may arise on account of difference in price at which gas was being supplied to the company and the price which may ultimately be determined by the court.

7. It has so happened that as referred to above there was a prior litigation between ONGC on the one hand and the Association of Natural Gas Consuming Industries (including Ambica Mills Ltd.) on the other hand regarding the unpaid dues to ONGC for supply of gas. The matter was initially contested in this High Court and subsequently, the order passed by this Court was carried to the Hon.'ble Supreme Court being Civil Appeal No.8350-40 of 1983. During the pendency of those

appeals, the Hon.'ble Supreme Court had directed ONGC on 15.4.1987 to continue to supply gas to these companies including Shri Ambica Mills Ltd. at the rate of Rs.1000/- for one thousand cubic metres. That was subject to an Undertaking to be given by the companies concerned that they will not charge, encumber or alienate except with the leave of the Supreme Court any of the immovable assets and they will make their immovable assets available for discharging their respective liabilities on account of the difference in the price of all the gas supplied which will be governed by the orders to be made by the court while disposing of the appeals. The order passed by the Supreme Court on 15th April 1987 reads as follows:

" These appeals will be listed peremptorily on July 21, 1987 as the very first case for regular hearing and above all other causes.

We direct that during the pendency of the appeals, the Oil and Natural Gas Commission will not disconnect the supply of gas to the respondents namely the Association of Natural Gas Consuming Industries of Gujarat, M.S.Jayant Paper Mills Ltd., M/s. Alembic Glass Industries Ltd., M/s. Alembic Chemical Works Company Services Ltd., New India Industries Ltd., Punjab Steel Rolling Mills Pvt. Ltd., Chanden Metal Products Ltd., and Shri Ambica Mills Ltd., Mill No.2 and will continue to supply gas as hitherto charging at the rate of Rs.1000/- for one thousand cubic meters subject however to the undertaking by the Respondents which has been given and has been accepted here, that the said Respondents will not charge, encumber or alienate, except with the leave of this Court, any of their immovable assets included in the respective undertakings and that they will make their immovable asset available for discharging the respective liabilities on account of the difference in the price of all the gas supplied to and further during the pendency of the appeals as permitted by orders made by the Court while disposing of the Appeals. The undertaking will be filed within four weeks from today."

8. Pursuant to that order, an undertaking was given by Mr.Prahladbhai S. Brahmhatt, who was the Secretary of this company. The undertaking dated 27.5.1987 reads as follows:

"UNDERTAKING

I, Prahladbhai S.Brahmbhatt, do hereby solemnly affirm, undertake and state as under:

1. I am working as Secretary in Shri Ambica Mills Ltd. Respondent No.10 herein which is one of the members of the respondent No.1 i.e. Association of Natural Gas Consuming Industries of Gujarat.
2. I am conversant with the facts and circumstances leading to the present proceedings and, therefore, I am competent as well as authorised to give this undertaking on behalf of the respondent No.10 company pursuant to their Hon.'ble Court's order dated 15.4.1987 passed in Civil Misc. Petitions No.7875-85 of 1987 in the present civil appeals. I state that the copy of the said order was made available to the respondent No.10 company by the office of this Hon.'ble Court only on 14.5.1987.
3. I state that respondent No.10 company undertake that none of immovable assets of the company will be further charged and encumbered hereafter with effect from 15.4.1987 i.e. from the date of order of this Hon'ble court except with the leave of this Hon.'ble Court.
4. I state that respondent No.10 company further undertake not to alienate any of its immovable assets hereafter with effect from 15.4.1987 except with the leave of this Hon.'ble Court. Respondent No.10 company further undertakes to make available all its immovable assets in the event of discharging the liabilities which may arise on account of the difference between the price at which all the gas being supplied in the company during the pendency of the proceedings in this connection and the price which may be determined by this Hon.'ble Court while disposing of the present appeals finally.

Solemnly affirmed on 27th day of May 1987 at Ahmedabad.

Dated: 27th May 1987 Sd/- P.S.Brahmbhatt,
Secretary".

9. It is relevant to note that, subsequently, those appeals filed by ONGC came to be allowed and the prices

charged by ONGC for supply of gas to various respondents were upheld. The said judgment dated 4.5.1990 ONGC v. ASSOCIATION OF NATURAL GAS CONSUMING INDUSTRIES OF GUJARAT is reported in 1990 (Supplementary) Supreme Court Cases 397 and the interim order passed by the Hon.'ble Supreme Court on 15.4.1987 is recorded in para 11 of the judgment appearing in the aforesaid report of the Supreme Court Cases.

10. Mr.Nanavati, learned Senior Advocate with Mr.Chudgar have appeared for the applicant whereas Mr.Ashok L.Shah has represented the Official Liquidator. Mr.D.S.Vasavada appeared for Textile Labour Association representing the workmen as intervener. Mr.Nanavati submitted that scope of proceeding under Section 446 of the Companies Act was a limited one and under sub-section (1) thereof the court has to consider whether the permission to proceed with the pending civil suit ought to be granted or not. He submitted that in dealing with such a situation, the court has to consider the interests of the company and has to see that its assets are not wasted in frivolous or unnecessary litigation. However, the Section did not impose a total prohibition against the proceeding either being taken or continued against the company in liquidation and leave should ordinarily be granted when the issues in the suit cannot be gone into and decided in winding up proceeding, that is, without holding a full-fledged trial and affording an opportunity to the contesting parties. He submitted that the inquiry contemplated under Section 446 of the Act is of a summary nature and the court was not expected to go deeply into the merits or demerits of the claim of the plaintiff. In short, Mr.Nanavati submitted that when complicated and triable issues are involved, leave was generally expected to be granted. It would be profitable to refer to Section 446 at this stage. It reads as follows:

"446. Suits stayed on winding up order - (1)

When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Court and subject to such terms as the Court may impose.

(2) The Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of -

- (a) any suit or proceeding by or against the company;
- (b) any claim made by or against the company (including claims by or against any of its branches in India);
- (c) any application made under section 391 by or in respect of the company;
- (d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company;

whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960 (65 of 1960).

- (3) Any suit or proceeding by or against the company which is pending in any Court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court.

- (4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court."

11. Mr.Nanavati relied upon various judgments in support of the aforesaid submission. Firstly, he relied upon the judgment of a Division Bench of this Court in the case of STAR ENGINEERING WORKS v O.L. OF KRISHNA KUMAR MILLS reported in (1997) 47 Company Cases 30. That was a case where the petitioner - plaintiff had been supplying goods to the defendant - company. The plaintiff had filed a suit in the Bombay High Court on 13.3.1972 for recovery of certain amounts for those goods with interest and costs. Prior to that, on 7.2.1972, the Gujarat High Court had passed a winding-up order and hence an application was made to the Gujarat High Court for leave to proceed with that suit or to transfer it to the Gujarat High Court. After scrutiny of the facts of the case, the division bench prima facie came to the

conclusion that the goods had been supplied on an 'approval and return' basis and since rejection had not been intimated within a reasonable period, the goods had passed to the defendant company in liquidation. The court however took the view that the term 'any claim' under Section 446 (2) (b) of the Act was wide enough to cover such claims for the goods and the court stated that it would be open for the party to lodge its claim and for the court to decide it. In that context, the Division Bench of this court relied upon an earlier Division Bench judgment of Bombay High Court in the case of BALKRISHNA M. VARTAK v. INDIAN ASSOCIATION OF CHEMICAL INDUSTRIES reported in (1958) 28 Company Cases 179. In that case, the Division of the Bombay High Court had held that the company in winding up should not be exposed to unnecessary litigation and unnecessary costs. In that context, the Gujarat High Court also held that " in dealing with such an application, the court has necessarily to consider the interests of the company and to see that its assets are not wasted in frivolous and unnecessary litigation". I do not understand as to how this judgment or the proposition in any way helps the applicant.

12. Mr.Nanavati, the learned Counsel for the petitioner also relied upon three judgments of the Hon.'ble Supreme Court. Firstly, he relied upon the judgment of the Supreme Court in the case of SUDARSHAN CHITS FUND LTD. v. SUKUMARAN PILLAI reported in (1984) 4 SCC 657. In that case, the Hon.'ble Supreme Court was concerned with a situation wherein the winding up order of the company court was kept in abeyance by the appellate court and the Supreme Court had to consider as to whether the company court would have jurisdiction under Section 446 (2) during that period. We are certainly not concerned with such a situation in the present case. It is, however, relevant to note that in this judgment the Hon.'ble Supreme Court has observed that summary remedy under this section had been conferred on the Company Judge to save the company which is ordered to be wound up 'from prolix and expensive litigation'. In that context, the Court observed: 'This was the object behind enacting Section 446 (2) and therefore it must receive such construction at the hands of the court as would advance the object and at any rate not thwart it' (para 8 of the report in SCC). Then Mr.Nanavati relied upon the judgment of the Hon.'ble Supreme Court in the case of ICICI v. SRINIVAS AGENCIES reported in (1996) 4 SCC 165. In that case, the court was concerned with the proceedings before the Debt Recovery Tribunal and the court held the Company Court should not transfer

suit to itself merely for its own convenience. The Hon.'ble Supreme Court laid down that the question as to when the company court should grant leave under Section 446 would depend upon facts and circumstances of each case. In fact, it was specifically submitted before the court (as can be seen from para 10 of the judgment) that as a rule, leave be granted subject to reasonable conditions. In para 13 of the judgment, the Hon.'ble Supreme Court observed " we are therefore of the view that the approach to be adopted in this regard by the company court does not deserve to be put in a straight jacket formula". Then, Mr. Nanavati relied upon the judgment of the Hon.'ble Supreme Court in the case of INDIAN BANK v. O.L. OF CHEMMEENS EXPORTS PVT. LTD. reported in (1998) 5 SCC 401. In that case, the court was concerned with the question as to whether under the provisions of section 446 the Company Court could declare the decree of a competent court to be void and the Supreme Court held that it could not. I fail to see as to how any of these judgments advance the proposition sought to be canvassed by Mr.Nanavati. In fact, in CENTRAL BANK OF INDIA v. ELMOT ENGINEERING CO. reported in (1994) 3 SCC 159, the Supreme Court has held that the aim of section 446 was to safeguard the asset of the company against wasteful or expensive litigation. It was also observed that while granting leave the court always takes into consideration whether the company is likely to be exposed to 'unnecessary litigation and cost'.

13. Mr.Nanavati then relied upon the judgments of other High Courts to canvass that when there are other defendants in a suit, courts would generally grant leave. This is because in the present case, the suit which is sought to be proceeded against Shri Ambica Mills Ltd. has ICICI, Ahmedabad Electricity Co. Ltd. and State of Gujarat as defendants Nos.2 to 4. In that context, Mr. Nanavati relied upon the observations of the Madras High Court in the case of T.V.PURUSHOTTAM & CO. v. PROVISIONAL LIQUIDATORS OF SUBHODAYA PUBLICATIONS LTD. reported in 1955 (25) Company Cases 49 wherein at page 52 a Single Judge of that court has culled out some of the general principles which govern such situations. That case was concerning a dispute regarding fixation of fair rent of the premises which the applicant had taken on lease from the voluntary liquidators of the company. The applicant had filed an application before the Rent Controller for fixing the fair rent. The company was subsequently ordered to be wound up. The applicant had applied to the court for leave to continue the proceedings. Leave was granted and, in that case, the court referred to some of the earlier judgments including

English judgments on page 52 of that report. In those observations, the court referred to WILSON v. NATAL INVESTMENT (1867) 36 L.J. Ch. 312 wherein it was held that where the question at issue is such that it cannot be conveniently gone into in the winding up, leave will generally be given. In the case before the Madras High Court, the question was with respect to fixation of fair rent and the court observed: "The order fixing fair rent has to be made only by the Rent Controller after taking into consideration various factors set out in the section and it is in the exclusive jurisdiction of the Rent Controller to fix the rent". In that context, leave was granted. The court, however, noted that in Re Marine Investment Company (1868) 17 L.T. 535 it had been held that in cases where company is a necessary party to the action but there are other defendants as well, the court should generally grant leave. But the learned Judge also added thereafter, "The court usually insists however upon an undertaking by the plaintiff that he will not enforce against the company any judgment which he may obtain without the leave of the court. (See McEwen v. London Bombay and Mediterranean Bank, Hagell v. Currie)". Mr. Nanavati then referred to a judgment of (then) Mysore High Court in the case of G.S.SETTY & SONS v. YELLAMMA COTTON WOOLLEN & SILK MILLS CO. reported in (1970) 1 Company Law Journal 184. In the facts of that case, the court held that the claim of the party concerned on the guarantee given by him could not be proceeded with in the absence of the first respondent company in liquidation. That was a case where a secured creditor wanted to remain outside the winding up proceeding and wanted to proceed with the suit and it was in that context that the leave sought for was granted.

14. What emerges from these judgments is that the proposition that as a rule leave to sue the company in liquidation ought to be granted is not accepted by the Hon.'ble Supreme Court in the ICICI case (supra). On the contrary, the court has held that whether leave should be granted or not will depend upon facts and circumstances of each case. Then, again, as held by the Hon.'ble Supreme Court in the case of CENTRAL BANK OF INDIA v. ELMOT ENGINEERING COMPANY (SUPRA), the Company Court has to take into consideration whether the company is likely to be exposed to unnecessary litigation and cost. Besides, as observed by the Hon.'ble Supreme Court earlier in the case of SUDARSHAN CHITS FUND (supra), [although in the context of Section 446 (2)] the object behind the section is to save the company from prolix and expensive litigation and the section must receive such construction at the hands of the court as would advance the object and at any rate not to thwart it. It in fact,

confirmed the approach of this court taken much earlier in the case of STAR ENGINEERING (supra).

15. Having looked into the judgments which hold the field with respect to the power under section 446 of the Companies Act concerning the grant of leave to sue a company in liquidation, we have to find out as to whether in the facts of the present case, the applicant has made out a case to proceed with the suit which it has filed in the City Civil Court at Ahmedabad. To begin with, it must be first noted that this suit No.4870 of 1995 has been filed in the City Civil Court at Ahmedabad on 14.9.1995. It is the submission of Mr.Nanavati that this suit has been filed prior to the passing of the winding up order which was passed on receipt of the opinion under Section 20 of the Sick Industrial Companies (Special Provision) Act, 1985. The opinion of the Board was registered as Petition No.121 of 1995 and the winding up order came to be passed on 17.1.1997. As against that, Mr.Shah points out that the order passed by this court (Coram Pandit J.) on Company Petition No.121 of 1995 specifically states that it is an order on Company Petition No.66 of 1988 (and other petitions including Company Petition No.121 of 1995) which was the earliest petition filed against this company and that petition had been kept in abeyance in view of the Reference to the BIFR. Mr.Shah submits that commencement of the winding up proceedings is defined in section 441 (2) of the Companies Act as deemed to have commenced at the time of presentation of the petition for winding up. Petition No.66 of 1988 was presented on 12.4.1988 and it had only remained in abeyance due to the reference to BIFR. The said proceeding was 'suspended and was not dismissed' in the words of the Hon.'ble Supreme Court as held by it in GRAM PANCHAYAT v, SHRI VALLABH GLASS CO. LTD. reported in AIR 1990 SC 1017. In fact, while passing the winding up order after receiving the opinion, Pandit J. had referred to the aforesaid Supreme Court judgment and specifically held while disposing of Petition No.66 of 1988 along with the Petition (on Opinion) No.121 of 1995 that it was the order on the earliest petition thereby making it clear that the winding up proceedings were pending through Petition No.66 of 1988 since 12.4.1988. That order has been confirmed in appeal and the appellate order has not been disturbed in any way thereafter. Thus, it is clear that the suit filed by the applicant company is, undoubtedly, filed after the commencement of the winding up proceedings under section 441 (2) and the winding up order will relate back to the date of filing of the first winding up petition.

16. That apart, the question as to whether the applicant ought to be granted leave to proceed with the suit requires to be examined. It is clear that the suit has been instituted without leave of the court but, as held by the Hon.'ble Supreme Court in the case of BANSIDAR v. MOHAMMAD IBRAHIM reported in 1971 (41) Company Cases 21, though the suit is instituted without leave of the court, still if leave is granted it can be deemed to be instituted from the date of granting leave. The question, however, has to be gone into as to whether in the facts of the present case, leave is required to be granted.

17. In that context, it is necessary to glance through the plaint of suit No.4780 of 1995 and the documents annexed therewith. As stated above, Shri Ambica Mills Ltd. (now in liquidation), ICICI, Ahmedabad Electricity Co. Ltd. and State of Gujarat are the defendants to this suit. In para 3 of the plaint, it is stated that the said Unit No.2 of defendant No.1 mill company was incurring heavy losses in 1988-89 and that the mill company was indebted to several financial institutions led by ICICI. In para 6 it is stated that in June 1989 there were discussions between the financial institutions led by ICICI, Government of Gujarat and the applicant and it was agreed that the mill company will sell Unit No.2 to the applicant subject to the mill company getting the necessary statutory clearances amongst others. In para 9 it is stated that upon these negotiations, the applicant decided to purchase the said Unit No.2 free from all charges and encumbrances. It is, however, stated that during these discussions the applicant had no knowledge and it was not disclosed to the applicant that defendant No.1 had given an undertaking to the Hon.'ble Supreme Court of India that it would not effect sale or transfer of its assets without the leave of the Hon.'ble Supreme Court. It is important to note what is stated thereafter in para 9 which is as follows: "Although the defendant No.2 was a party to the proceedings before the Hon.'ble Supreme Court of India in which the said undertaking had been given as was subsequently discovered by the plaintiff, the fact of such undertaking was never disclosed to the plaintiff either by the defendant No.1 or by the defendant No.2. From the minutes and the resolution of the Extraordinary General Meeting and from the various correspondence and minutes of the proceedings it never appeared that there was any impediment to the completion of the sale. The necessity for obtaining leave from the Hon.'ble Supreme Court for the purpose of completing the proposed sale was never disclosed to the plaintiff."

(underlining supplied).

18. From what is narrated above, it is clear that as per their own say of the applicant the applicant had gone through the minutes and the resolution of the Extraordinary General Meeting and that from the various correspondence and minutes of the proceedings there appeared no impediment to the completion of the sale. It is further averred as seen in the above paragraphs that the applicant was never otherwise also disclosed that there was an undertaking given by the mill company to the Hon.'ble Supreme Court, thereby the applicant was also never informed of the necessity to obtain any leave from the Supreme Court for completion of the proposed sale. Thereafter it is stated that an agreement was entered into on 2.11.1989, then a further agreement on 6.12.1989 and one more agreement on 9.12.1989 which was described as the working agreement. On 9.12.1989, a power of attorney and deed of indemnity were also executed. It is further averred in para 11 that defendant No.1 mill company had represented to the applicant that it had made full disclosure concerning all matters in respect of the undertaking which was being sold and these representations were recorded in the agreement dated 2.11.1989. The plaint further states that the applicant bona fide believed these representations and acted on them in good faith.

19. Then it is stated in para 15 that after taking possession, the applicant spent about Rs.2.75 crores for the repairs of plant and machinery; they purchased additional machinery and also took on lease other machinery in order to run the mill; they brought in additional funds for the working of the unit to the extent of about Rs.1.4 crores; they invested additional capital to the extent of Rs.3 crores. Thereafter it is stated "The Plaintiff had to dismantle and remove the old machinery, plant and equipment. The plaintiff had also to carry out repairs, renovation, replacement of the plant and machinery. The plaintiff had to add and install new and other necessary machinery, plant and equipment at considerable expense" (underlining supplied). Thereafter it is stated in para 16 of the plaint that the total agreed consideration for the proposed sale was to the tune of Rs.6.2 crores, but a substantial part of it was to be paid directly to the specific creditors. This was nearly in the range of Rs.4.25 crores. Apart from this amount, the payment to be made to the workers towards gratuity and retrenchment compensation was quantified and the final consideration was also fixed in a particular manner as stated in the

said paragraph. The plaintiff thereafter went into possession and started running the mill.

20. Thereafter, it is stated in the plaint that defendant No.1 (mill company) obtained the clearance under Section 230-A of the Income Tax Act for completing the sale and also the required permission from the Ministry of Textiles. However, with respect to the applicant's requisition concerning the title to the property no clearances were given by the mill company. It is thereafter stated in para 26 that it was only in the balance sheet of the year 1991-92 (which became available in September 1992) that the applicant found that in the Auditor's Report there was a mention of the order of injunction granted by the Hon.'ble Supreme Court of India by reason of which execution of the deed of conveyance in favour of the plaintiff was remaining pending. In the balance sheet it was mentioned that defendant No.1 had disposed of Mill No.2 but the final sale could not be completed because of certain "technicalities". It was only thereafter on making inquiries that the applicant came to know for the first time about the previous litigation with ONGC pending since 1979 and the undertaking given by the respondent mill company to the Hon.'ble Supreme Court.

21. Thereafter it is disclosed in para 28(d to f) that the appeals preferred by ONGC were disposed of subsequently on 4.5.1990 and the judgment and order of the Gujarat High Court was set aside by the Supreme Court. It is stated thereafter that ONGC filed a contempt petition on 17.8.1990 and on 26.8.1990 the defendant No.1 tendered an unconditional apology for the breach of the order. Thereafter, it is stated in para 28 (g & h) that the defendant No.1 had approached the Hon.'ble Supreme Court on 5.11.1991 for modification of the order dated 15.4.1987. The Supreme Court disposed of that application on 6.1.1992 and noted that the affairs of defendant No.1 were before the BIFR and the best course was to approach that authority. In paras 31 to 34, it is stated that the applicant also approached BIFR for leave to participate in the proceedings. In July 1993, the defendant No.1 made an application before the Supreme Court seeking permission to execute the documents of transfer of Unit No.2. "The said application was disposed of by an order dated 10.8.1993. The defendant failed to obtain such permission." Thereafter, in paras 35 & 36 it is mentioned that since BIFR had expressed its inability to give any direction, defendant No.1 made another application to the Hon.'ble Supreme Court but no

prayer with respect to Unit No.2 was made at that time. Para 37 thereafter states amongst others as follows: "In May 1994, the plaintiff thereafter made an independent application to the Hon.'ble Supreme Court of India for leave to be given to the defendant No.1 for transferring the Unit No.2 by executing and registering the necessary documents in favour of the plaintiff. The application came up for hearing before the Hon.'ble Supreme Court on 9.1.1995. The Hon.'ble Supreme Court dismissed the said application after recording that the allegations made in the counter affidavit filed by defendant No.1 were not admitted by the plaintiff. In the said counter-affidavit defendant No.1 had falsely stated that the fact of the said undertaking was disclosed to the plaintiff at the material time". Thereafter it is stated in para 38 that, in these circumstances by a letter dated 24.1.1995 the plaintiff rescinded the agreement with defendant No.1 and called upon them to take back possession of Unit No.2. Then, in the subsequent para, more particularly in para 43, it is specifically contended that the plaintiff was deceived and defrauded by defendant No.1.

22. Thereafter in paras 49 to 56 the applicant has sought to make out a case for an amount of Rs. 23,99,81,507. In these paras, the claim made is as follows:

- A. Para 49 Rs. 7,89,39,100
- B. Para 50 Rs. 6,44,10,000
- C. Para 52 Rs. 5,71,49,606
- D. Para 53 Rs. 3,94,82,801

Para 49 includes the claim for compensation for the loss incurred and damages suffered through non-fulfillment of the contract. The items of para 49 are as follows:

- (a) Payment made towards wages, privilege leave, provident fund, ESI, on account of the defendant No.1 as per clause No.2 (a) Group (d) (i) (ii) (iii) (iv) of the agreement dated 2.11.1989. Rs.44,56,000/-
- (b) Payment to Union Bank of India on account of the defendant No.1 as per clause No.2 (a) Group (d) (v) of the said Agreement. Rs.22,44,000/-
- (c) Payment of Gratuity and retrenchment compensation on account of the defendant No.1

Rs.2,63,40,000/-

(d) Amount paid to ICICI on account of the
defendant No.1 Rs.5,00,000/-

(e) Amount paid on account of Municipal tax
and Land revenue on account of the defendant No.1
Rs.21,67,000/-

(f) Amount spent on repairs, maintenance/
removal of building plant and machinery so as to
put in use. Rs.3,12,84,048/-

(g) Amount spent on construction
Rs.23,00,802/-

(h) Liability incurred on account of leasing
equipment and machinery (payment already made)
Rs.86,81,000/-

(i) Amount paid by the plaintiff on behalf of
the defendant No.1 and credit amounts received
from the defendant No.1:-

(a) Leave encashment prior to take over
Rs.7,29,374/-

(b) ESI contribution for the period Dec.1 to
December 9, 1989 prior to takeover
Rs.7,474/-

(c) TDS Interest on security deposit for the year
1990-91 with Ahmedabad Electricity Co. (since the
certificate was issued in name of Shri Ambica
Mills, as such TDS credited to Ahmedabad Elec.
Co.) Rs.29,402

Rs.7,89,39,100/-

23. Para 50 of the plaint claims an interest at the rate of 18% on the aforesaid amount upto the date of rescinding of the contract i.e. 24.1.1995 and then upto 31.8.1995 (since the suit was filed on 14.9.1995). Paras 51 & 52 include the claim for items of machinery, equipment, motor vehicles and other vehicles which are brought into the mill premises and which are lying over there. The applicant claims that those articles should be returned to the applicant failing which the value thereof is claimed which is to the tune of Rs.5,71,49,606. In para 53 various liabilities which were incurred by the plaintiff for the purpose of running the said unit, such as, electricity dues, Sales Tax dues,

municipal tax and land revenue are claimed. They are totalling to Rs.3,94,82,801. Paras 58 & 61 of the plaint are also very relevant. In para 58 it is stated that the amount (of Rs.23,99,81,507) which is claimed earlier is not the full claim and the plaintiff has not been able to fully ascertain the amount of compensation recoverable. In para 61 it is stated that ICICI and Ahmedabad Electricity Co. are joined in the suit since it is proper that the declarations which are sought are obtained in their presence 'though no other relief is sought against them.' Though there is no mention as to why the State of Gujarat is joined as defendant, no relief is sought against the State of Gujarat whatsoever in this plaint as initially filed. These two paras 58 & 61 read as follows:

"Para 58. The plaintiff has been unable to fully ascertain the amount of compensation recoverable by reason of the loss incurred and damages suffered by the plaintiff. With the passage of time more and more liabilities are coming to light which the defendant No.1 is wrongfully denying and seeking to foist upon the plaintiffs in spite of the fact that the contracts have been rightly rescinded. In these circumstances, the plaintiff prays for leave under Order 2 Rule 2 of the Code of Civil Procedure to file subsequent suits for recovery of further amounts by way of compensation and by way of further relief arising out of the same transactions and cause of action."

"Para 61. In as much as the declarations have been sought regarding the obligations under the aforesaid agreements which have been rescinded it is just and proper that such declarations are sought in the presence of ICICI and Ahmedabad Electricity Co. Ltd. Apart from the declaratory decrees claimed herein no other relief is sought against those defendants."

24. The applicants have produced copies of the agreement dated 2.11.1989, supplemental agreement dated 6.12.1989, working agreement dated 9.12.1989, power of attorney dated 9.12.1989 and a copy of the deed of indemnity dated 9.12.1989 along with the plaint. The first agreement date 2.11.1989 runs into some 58 pages. In the agreement dated 2.11.1989, the first four paras contain recitals. Then in para 5 it is stated that the parties are desirous of recording the said terms and conditions and the agreement witnesseth and it is agreed

by and between the parties as provided in the subsequent clauses (which are in all 40). In clause No.1 it is stated that the vendor shall sell, grant, convey and assign and the purchaser shall purchase and acquire from the vendor the said Unit Mill No.2 consisting of freehold and leasehold land together with factory, building and other structures standing thereon and more particularly described in the First Schedule on a plan annexed thereto, and also plant and machinery, electrical and other assets, more particularly described in the Second Schedule along with fixtures and fittings installed as a going concern free from all claims, charges and encumbrances in a lumpsum price of Rs.4.25 crores. Thereafter in Clause 2 it is provided as to in what manner the purchase price of Rs.4.25 cores is to be paid. In that, the liabilities are divided into four heads. Group A consists of Loans of IDBI, ICICI and IFCI. Group B consists of deposits of General Insurance and Unit Trust of India. Group C consists of liabilities of Debenture holders and Group D consists of various other existing liabilities including salary, wages, contribution towards Provident Fund, ESI, leave pay, DPG (deferred payment of guarantee) liability to Union Bank of India. Then, in sub-clause (c) of Clause 2 it is provided that all liabilities in excess of the above amounts on the date of making over possession shall always be the liabilities of the vendor. In Clause 9, it is provided that the purchaser shall pay the retrenchment compensations and gratuity to the workers who have expressed their intention to be retrenched. The details of workers who have expressed to be retrenched have been worked out and understood between the vendor and the purchaser. Then in Clause 10 it is provided that the purchaser shall have no liability to pay Provident Fund, FPF, ESI and all other dues of the workers, employees and the staff upto the date of receiving possession. In Clause 11, it is provided that upon payment of the said gratuity, the vendor shall make over possession of the said undertaking and the vendor shall hand over to the purchaser possession of the said undertaking and all lands together with the factory building and other structures, plant and machinery, furniture, fixtures, fittings etc. What is provided thereafter in this clause is as follows:

"AND the purchaser shall be entitled to exercise all rights of ownership in respect of the said properties and rights etc. notwithstanding that the sale deed has not been made and executed and the documentation in respect of transfer of all the properties, rights etc. or some of them have

not taken place until then and the purchaser company shall not be bound to part with possession of the same for any reason and under any circumstances whatsoever."

Clause 12 thereafter records what the vendor has informed, represented and warranted to the purchaser. Sub-clause (p) of Clause 12 states:- "at the Extra Ordinary General Meeting of the Shareholders of the vendor held on 30.3.1989 at Ahmedabad, the shareholders of the Vendor have passed the necessary resolution under Section 293 (1) of the Companies Act, 1956 for the sale of the said Undertaking by the Vendor". Clause 18 of the agreement reads:- "The vendor shall bear, pay and discharge all debts, liabilities including statutory liabilities, taxes under any Act, Order, Rule or Regulation of both the State Government and the Central Government as also local body or authority all in respect of the said unit upto the date of handing over possession thereof to the purchaser and shall keep the purchaser and the said unit/ undertaking at all time fully and effectually indemnified from and against all claims and demands in respect of all such liabilities accruing and/or payable for the period prior to the date of handing over possession of the said Undertaking and from and against the said debts liabilities and payments and also all costs charges expenses loss and damages as the purchaser may have to suffer or incur or be put to on account of non-payment of any of the aforesaid liabilities as also against all suits actions and proceedings and/or any other order that may be taken against the purchaser or against the said Unit on account of any act done or omitted to be done by the Vendor prior to the handing over possession of the said undertaking. As from and after the date of the possession the purchaser shall be bound and liable to bear, pay and discharge all outgoing and liabilities in respect of the said undertaking." Clause 22 provides that on and from the date of taking over possession of the undertaking, the purchaser shall continue to employ the existing staff as if their services are continuous service and not interrupted. Clause 23 (a) provides that the vendor shall be liable to pay all dues of all employees who have left the services of the vendor prior to the date of handing over possession of the said undertaking. Sub-clause (b) of clause 23 provides that the purchaser shall be bound and liable to pay from the date of taking over possession with respect to the dues of the employees. Clause 29 further clarifies that all income, profit and loss upto the date of handing over possession shall belong to the vendor.

25. Thereafter, the Supplemental agreement dated 6.12.1989 is produced. It states in Clause 1 that the quantification of lumpsum price of Rs.4.25 crores and payment to be made to the workers towards gratuity and retrenchment compensation as stated in the earlier agreement have been agreed and these are quantified as provided in the agreement. Clause 2 of this supplemental agreement gives the figure of gratuity and retrenchment compensation to 771 employees which comes to Rs.1,95,45,918. In the earlier agreement, the price of Rs.4.25 had been mentioned as the price of the earlier agreement. Thus, both together, the amounts come to Rs.6,20,45,918. The value of the property which is sought to be sold including the amount of plant and machinery is also provided in this agreement which is shown as Rs.6.20 crores. Then it is provided that the parties will approach the Income Tax authorities under Section 269 (UC) of the Income Tax Act for the No Objection Certificate. Thus, the entire property is to be sold at about Rs.6.20 crores out of which Rs.4.25 crores are supposed to go towards various liabilities as described in 4 sub-groups of Clause 2 of the earlier agreement and Rs.1,95,45,918 is to be given to 771 employees to be retrenched. Thereafter, the working agreement dated 9.12.1989 and the deed of indemnity (whereunder the vendor has agreed to indemnify the purchaser) is produced.

26. The applicant has then produced the notice of motion and the affidavit in support taken out in the suit. Thereafter, a copy of the written statement dated 22.4.1996 filed by the State of Gujarat is produced wherein it is stated in para 4 thereof that an amount of Rs.2,50,67,746.36 regarding the deferment of electricity duty and sales tax on electricity was to be recovered from the company. It is further stated that the dues of Rs.64.88 lacs are regarding interest free loan given to the company through GIIC and they are yet to be recovered. It is further submitted in that reply that the deferment amount of sales tax has not been paid by the company. Then it is stated that in view of the above, either the plaintiff or the defendant No.1 has to pay the Government dues with interest as per the Government Resolutions while giving the reliefs and concessions. Thereafter, the applicant has produced the Application for Amendment moved in the suit to add para 57-A to state that the State of Gujarat is not entitled to recover the electricity duty as well as the sales tax from the plaintiff. They also sought a declaration that the plaintiff is not liable for the said amount of

electricity duty as well as sales tax to defendant No.4 and the defendant No.4 be permanently restrained from demanding those amounts from the plaintiff.

27. The applicant has thereafter produced a compilation of the Interlocutory Application No.....of 1994 (number not given) in Civil Appeal No.8530 - 40 of 1983 which was moved by the applicant to the Supreme Court. This application narrates various facts as stated above including entering into the agreement and subsequently coming to know about the injunction granted by the Hon.'ble Supreme Court and being 'tricked' by Shri Ambica Mills Ltd. Para 32 of this Application begins as follows: "Under these circumstances, the applicant is now approaching this Hon.'ble Court for completing the transfer of Unit No.2 by execution and registration of the conveyance". In para 38 of this Application it is stated that, "in the facts and circumstances of the case, the Court should be pleased to direct the execution and registration of the conveyance of Unit No.2 in favour of the applicant. The conveyance of Unit No.2, if permitted, will not adversely affect the claim of ONGC in any manner and no other party will suffer any prejudice thereby. In fact, it would enure to the benefit of all parties concerned" (underlining supplied). In para 39 it is stated that the applicant has performed all its obligations under the agreements. Prayer (b) of this Application is for ex post facto leave for alienation of Unit No.2 in favour of the applicant and Prayer (c) is to seek modification of the order dated 15.4.1987 and to direct Shri Ambica Mills Ltd. to execute and register the necessary documents for completing the transfer. The applicant has thereafter produced various documents which were annexed to the appeal memo as well as the orders passed by the Hon.'ble Supreme Court from time to time.

28. In the circumstances, Mr. Nanavati, learned Senior Counsel appearing for the applicant submitted that the applicant was a bona fide purchaser for value of Unit No.2 and the applicant had acted on the agreements which were valid when they were signed. Mr. Nanavati submitted that the injunction of the Hon.'ble Supreme Court or non-compliance of some of the provisions of the Companies Act with respect to disclosure of full particulars to the Shareholders in the Extraordinary General Meeting by Shri Ambica Mills Ltd. would not make the agreements bad in law at the outset. The applicant had invested huge amounts to run the said unit. It had spent about 2.75 crores for repair of plant and machinery; it had purchased additional machinery and took on lease other machinery to run the mill; it had brought

in additional funds for working of the unit to the extent of Rs.1.40 crores. The applicant had invested additional capital to the extent of Rs.3 crores; the applicant had to dismantle and remove the old machinery plant and equipment. The applicant had also to carry out repairs, renovation, replacement of the plant and machinery and it had to add and install new and other necessary machinery plant and equipment at considerable expense as stated in para 15 of the plaint. The applicant paid substantial amounts to the employees who were retrenched by paying to them retrenchment compensation and gratuity. The applicant incurred various expenses for running of the unit and incurred various other liabilities like electricity dues, sales tax, municipal rates and taxes and land revenue etc. Mr. Nanavati submitted that the applicant was, therefore, entitled to recover all these amounts from the mill company. He submitted that the applicant was entitled to damages and compensation over and above some of the claims of actual expenditure and also interest at the rate of 18% totalling in all nearly to Rs.24 crores as on the date of filing the suit. The submission of Mr.Nanavati was that the applicant should be permitted to claim these costs against the company in liquidation and for that the leave was necessary.

29. The submission of Mr.Nanavati is that the agreements as entered into initially were valid and the applicant tried to act upon them honestly and in accordance with the spirit of those agreements. However, the applicant was kept in dark and was not informed about the injunction issued by the Hon.'ble Supreme Court and the undertaking given by the mill company. When the mill company did not get any clearance from the Hon.'ble Supreme Court, the applicant tried to seek the same by making necessary application to the Hon.'ble Supreme Court. However, when that also failed, it decided to avoid the agreements. Mr.Nanavati submitted that the agreements became voidable when the applicant came to know that they could not be acted upon to complete the conveyance because of the injunction granted by the Hon.'ble Supreme Court. As far as the applicant is concerned, the applicant was not knowing anything about the injunction or the undertaking and therefore qua the applicant, the agreements became voidable when the applicant acquired the knowledge about the injunction and the undertaking at a later point of time. The applicant, therefore, decided to avoid the agreements and in the submission of Mr. Nanavati, that agreements will have to be treated as voidable at the instance of the party which suffered. He submitted that a fraud had been played upon the applicant and on coming to know about it, as provided

under Section 19 of the Indian Contract Act, the agreements became voidable at the option of the applicant which had suffered in this bargain. The applicant, therefore, rescinded the agreement by issuing a notice on 24.1.1995 and called upon the company to compensate and to pay damages and to take over the Unit No.2. The reaction of the mill company to this notice was however a negative one. As stated in para 47 of the plaint, the mill company replied by their letter dated 4.2.1995 that Unit No.2 had been sold to the applicant and the mill company was under no obligation to take it back. In fact, what they submitted was that it was the applicant who are under an obligation to run the unit as all the assets thereof had been passed on to the applicant. Not only that, but the mill company proceeded to file a suit against the applicant in the City Civil Court at Ahmedabad bearing No.2865 of 1995 wherein they prayed:

(A) to declare that the action of closure of the said unit by the defendant was in breach of the contract and that the applicant is under an obligation to continue to carry on the running of the said Unit No.2 ; and

(B) a mandatory order of injunction directing the applicant to continue to carry on the running of the said Unit No.2 be passed.

It is thereafter that the applicant has filed Civil Suit No.4780 of 1995 in the same court. Mr.Nanavati, therefore, submitted that if leave to proceed with Civil Suit No.4780 of 1995 is not granted, the applicant will not be able to proceed with the suit that it had filed against the mill company. It was necessary for the applicant to prosecute the said suit along with the suit filed by the mill company otherwise the applicant will be rendered incapable in defending the civil suit filed by Shri Ambica Mills Ltd. It was submitted that to defend the suit filed by Shri Ambica Mills Ltd. effectively it was absolutely necessary for the applicant to seek the declaration as sought in Civil Suit No.4780 of 1995 to the effect that the agreements entered into by and between the applicant and Shri Ambica Mills Ltd. had been lawfully rescinded and that the applicant was not liable to perform any of the obligations under or arising out of the said agreements.

30. Mr.Nanavati then submitted that apart from Shri Ambica Mills Ltd., there were other defendants Nos.2, 3 & 4 in the suit viz. ICICI, A.E.Co. Ltd. and State of Gujarat. He pointed out that by way of amendment of the

suit, a declaration had also been sought that the applicant was not liable for the amount of electricity duty as well as sales tax to be paid to the State of Gujarat and an injunction to that effect had also been prayed. Mr. Nanavati submitted that the suit for compensation and damages was very much maintainable against the company in liquidation and he relied upon the wordings of Section 446 (2) (a) of the Act which provides for "any suit or proceeding by or against the company". In his submission, the Legislature had not made any distinction between the suit for damages and compensation on the one hand and the other suits, and therefore the suit already instituted should be permitted to be proceeded with. Alternatively, he submitted that, in any case, assuming without admitting that a suit for damages does not fall within the purview of Section 446 of the Companies Act, the suit which was instituted was also for various other declaratory reliefs against the company in liquidation as also against the other defendants such as the State Government. He, therefore, submitted that it will be in the interest of justice and in consonance with equity that the application ought to be allowed.

31. Mr. Ashok L. Shah, learned Counsel appearing for the Official Liquidator on the other hand submitted that the agreements (including the initial one dated 2.11.1989) were void right at the outset for various reasons as provided under Section 24 read with Section 23 of the Indian Contract Act. Mr. Shah submitted that this was a case -

(a) firstly, where the agreements were entered into in clear violation of the injunction dated 15.4.1987 issued by the Hon.'ble Supreme Court and in violation of the undertaking dated 27.5.1987 given by the company to the Hon.'ble Supreme Court. Thus, the agreements were forbidden by law and opposed to public policy and therefore their consideration and object were unlawful;

(b) secondly, the agreements were entered into on 2.11.1989, 6.12.1989 and 9.12.1989, i.e. much after the commencement of the winding up proceedings which were initiated by filing of the first winding up Petition No.66 of 1988 on 12.4.1988 which were duly advertised as provided by law. The agreements provided for disposition of the property of the company and such disposition of the property made after the

commencement of the winding up proceedings is void under Section 536 (2) of the Companies Act unless the court otherwise orders and no such application for validation has been filed in the Company Court till this date; and

(c) thirdly, the agreements are entered into without there being proper authority for the same inasmuch as all material facts including the injunction and the undertaking were not disclosed to the Share holders in the Extraordinary General Meeting of Shri Ambica Mills Ltd. which was held to seek the sanction to these agreements on 30.3.1989. The notice calling the said meeting was in breach of the mandatory requirement of Section 173 (2) of the Act and therefore the consent obtained in the said meeting as required under Section 293 (1) (a) of the Act was not a valid consent in the eyes of law.

32. Mr.Shah also submitted that assuming (for the sake of argument) without accepting that the agreement was in any way a valid one at its inception and became voidable at a later point of time, there are certain limits to the right to rescind it and one has to avoid the agreement at the earliest. In the present case, the facts were to the contrary. Mr.Shah submitted that right from the time the applicant was put in possession of Unit No.2 i.e. on 9.12.1989, it was in full control of the said unit and it continued to run it. Even after coming to know about the alleged deception in September 1992 (as stated in their plaint) when they became aware of the injunction and the undertaking not only that they represented to the Hon.'ble Supreme Court that the applicant were ready and willing to complete the conveyance but sought directions to the mill company to execute the conveyance. It was only when that attempt failed that the notice to rescind was given on 24.1.1995. Mr.Shah submitted that the applicant cannot approbate and reprobate at the same time. The applicant must have made good profits during this period. Otherwise, it would not have invested so much amounts to run the unit. It had, in fact, tampered with the property of Unit No.2 and as it averred in para 15 of the plaint, it had dismantled and removed old machinery plant and equipment. If that was so, a party which had received advantage under the agreement which had become void (according to it) was bound to restore the advantage and to compensate for the dismantling and removal of machinery as required under Section 65 of the Contract Act. Mr.Shah submitted that although a hue and cry was raised with respect to the

expenses incurred by the applicant and compensation and damages were sought, in fact, there was no merit in any of the claims sought to be canvassed through the plaint. Mr.Shah lastly submitted that, in any case, a suit for compensation and damages against company in liquidation cannot lie. He submitted that the winding up Court has to decide the liabilities as they existed at the commencement of the winding up and no new rights can thereafter be created nor can any incomplete rights be completed. Doing so would be contrary to the creditors' rights.

33. To counter the above submissions of Mr.Shah and to advance his first contention that the agreement at its inception was a valid one, Mr. Nanavati and Mr.Chudgar submitted that the injunction granted by the Hon.'ble Supreme Court was not a blanket one. He submitted that the applicant company was a bona fide purchaser and it should not be made to suffer inasmuch as it was deceived by Shri Ambica Mills Ltd. as stated in their application. The second submission is that assuming that there was any such injunction or undertaking, if one closely scrutinize the order passed by the Hon.'ble Supreme Court, what was directed was that the company

will not charge, encumber or alienate except with the leave of the Supreme Court any of their immovable assets. It was submitted that the company had entered into an 'agreement for sale' and 'no outright sale' was effected by effecting conveyance deed which could be done with the leave of the court. It was further submitted that this cannot be considered as encumbering the property. Mr.Chudgar relied upon the definition of the word 'Charge' as appearing in the Transfer of Property Act 1882, and submitted that 'charge' is an act 'where immovable property is made security for the payment of money to another and the transaction does not amount to a mortgage'. As far as encumbrance is concerned, Mr.Chudgar relied upon the definition of this concept in various dictionaries including Concise Oxford Dictionary (Ninth Edition), Black's Law Dictionary (Fifth edition) and Random House Dictionary (unabridged edition). The third submission of the applicant was that the agreement was not void but at the most voidable. Comparing the injunction granted by the Supreme Court with the restriction created under Section 43 (1) of the Bombay Tenancy and Agriculture Lands Act (prior to its amendment of 1997), Mr.Chudgar submitted that a subsequent sanction could be granted under that Act and similarly in the present case as well. He relied upon two decisions of this court reported in 16 (1975) GLR 247 and 24 (2)

(1983) GLR 1165 in this behalf. He has also relied on the judgment of the Supreme Court in the case of NATHULAL v. PHOOLCHAND reported in AIR 1970 Supreme Court 546 to contend that when a statute prescribes a prior permission of an authority before sale, an agreement to transfer is not void but it must be deemed to be subject to implied condition that the transferer will obtain sanction of the authority concerned. The next submission of Mr.Chudgar in this behalf was that failure to mention the injunction and the undertaking in the explanatory statement would even otherwise also not make the resolution passed under Section 293 (1) (a) bad. He submits that, at the most, the agreement could be said to be a voidable one but not void ab-initio. He further submitted that the applicant has put in a good amount of money and they have also taken efforts to run the enterprise for a substantial period. However, having failed in that, the applicant had rescinded the agreement and they were entitled to compensation and damages. Mr.Chudgar also submitted that violation of the injunction may at the highest invite penal consequences against the vendor. Mr.Chudgar relied upon various judgments in support reported in AIR 1938 Lahore 220; AIR 1920 Nagpur 12; AIR 1989 Orissa 148, AIR 1992 P&H 237, AIR 1969 AP 167, AIR 1669 Orissa 195 in that behalf. The fourth submission of Mr.Chudgar was that the agreement cannot by any stretch of imagination be said to be opposed to public policy or prohibited by any law. He also relied upon the judgment of the Supreme Court in AIR 1959 SC 781 and AIR 1960 SC 213 in this behalf.

34. As against the aforesaid submission of Mr.Nanavati and Mr.Chudgar, Mr.Shah submitted that the applicant's submission that the applicant company was a bona fide and innocent purchaser and it suffered in the transaction was itself a very doubtful one. He pointed out that the applicant company took possession of Unit No.2 on 9.12.1989 and although it was only an agreement to sell (not a full conveyance) on the basis of which the applicant was put in possession, all acts of ownership were permitted and were, in fact, done. It cannot be said by any stretch of imagination that the applicant ran the enterprise for nearly five years from 9.12.1989 to 24.10.1994 when the unit was closed down, as stated by them for disconnection of power supply. During this period, if the applicant had installed machinery and brought about any innovations, it was a part of the business risk that it was taking. In Clause 11 of the agreement it was specifically stated that after the payment of gratuity to the workmen as provided therein and after the purchaser is put into possession, "the

purchaser shall be entitled to exercise all rights of ownership in respect of the said properties and rights etc. notwithstanding that the sale deed has not been made and executed and the documentation in respect of transfer of all the properties, rights etc. or some of them have not taken place until then the purchaser company shall not be bound to part with the possession of the same for any reason and under any circumstances whatsoever." The applicant was entitled to all the profits thereafter which it must have earned. Mr.Shah submitted that, if one co-relates various averments in the plaint with the provisions of the agreement, no averments can also be noted with respect to all the parts of the responsibilities under the agreement having been performed by the applicant. It is, undoubtedly, true that the applicant was put in possession on 9.12.1989 which is what is accepted by the applicant. But as far as the payment to be made by the applicant towards the liabilities of the company or to the workmen, there were averments made in the plaint only with respect to some of the items which could be co-related to the provisions of the agreement. Thus, for example, an amount of Rs.5 lacs is claimed to have been paid to ICICI against the liability of Rs.18.75 lacs. Then, there is a claim with respect to wages, some payment towards leave encashment, ESI contribution and gratuity as also some payment to Union Bank of India. There is, however, no clear averment that the entire amount of Rs.6.2 crores was in any particular manner cleared/ paid to the creditors of the company in liquidation or to the employees nor are any documents produced in support thereof along with the plaint. Mr.Chudgar submits that it is a matter of evidence and it will be produced in the court when the trial begins. Surely, when a submission is being made that the applicant has fully acted in accordance with the obligations under the agreement, the necessary documents ought to have been produced along with the plaint. In any case, as of now, all that we have are some averments having some co-relation with respect to some of the liabilities under the agreement. In the circumstances, it is not possible for this court to infer that the applicant has discharged all its obligations under the agreement. Mr.Chudgar sought to suggest that some of the liabilities of the workmen even for the period prior to 1989 were cleared by the applicant. Mr.Shah, on the other hand points out that there is no clear assertion in this behalf but, even so, if that be the case, the applicant is at liberty to lodge the claim with the Official Liquidator if they deem it fit. For the time being, on merits, it is difficult to say that the applicant has made out a case that it has acted fully in

accordance with the agreements performing all its obligations.

35. With respect to the submission of Mr.Chudgar that the agreement was a valid one at its inception and had subsequently become voidable at the most and not void, Mr.Shah submitted that the same was not tenable also for two main reasons: firstly, as stated above, the agreement was entered in flagrant violation of the order of injunction granted by the Supreme Court and the solemn undertaking given to the Apex Court. It is very material to note that the same Mr.Prahaladbhai S. Brahmabhatt who has given the Undertaking to the Hon.'ble Supreme Court has signed the Explanatory Statement under Section 173 (2) of the Act which is totally silent about the order of the Supreme Court as also the undertaking given to it. It is also very relevant to note that Mr. Brahmabhatt has signed the Explanatory Statement by the order of the Board of Directors. If that was so, all the members of the Board were also responsible for this violation of the order and the undertaking given to the Supreme Court. The same very Mr.Brahmbhatt has signed the requisite Form No.23 and the forwarding letter sending the form with the resolution to the Registrar of Companies. Mr.Chudgar sought to contend that what was prevented under the order of the Supreme Court was creation of a charge or encumbrance or alienation except with the leave of the court. It is perhaps possible to contend that the agreement entered into did not amount to a 'charge' because, admittedly, it was an agreement for sale and it is also possible to contend that an 'alienation' has not taken place inasmuch as the conveyance was yet to be executed. However, in my view, apart from the fact that the entire order (including these restrictions) has to be read together; the first part of the Supreme Court order also includes a restraint on encumbrance. The definitions of encumbrance referred to and relied upon by Mr.Chudgar clearly include an element of creating a burden on the property. By no stretch of imagination can it be said that this agreement for sale did not create a burden or an encumbrance on the property concerned.

36. However, that is not the only part of the restrictions. The other part of the direction of the Supreme Court was that the property will be made available for discharging the respective liabilities on account of the difference of price of all the gas supplied and further, during the pendency of the appeals as permitted by orders made by the court while disposing of the appeals. Again, if we look to the order of the Hon.'ble Supreme Court, what was submitted to the court

and what was contemplated was that the mill company will be run by the then management. If any alienation of the property to any third party was contemplated or was to be permitted, firstly the court could have said that. Thus, on the one hand what was submitted to the court was that in the interest of the large work-force, ONGC ought to be directed to make available gas on the concessional rate and the establishment will be run by very management. On the other hand, if we look to the entire agreement, it is clear that from the date on which the possession was handed over to the applicant herein, all the liabilities were passed on to them. If one looks to the various clauses of this agreement, it is clear as if the date of putting the applicant into possession was like a 'cut-off' date, and from that date all the liabilities go over to the purchasing party. It is stated in the application that possession was handed over in December 1989. Thus, it is apparent that though the document is styled as an agreement to sell, it is almost in the nature of a conveyance. It is, therefore, easy to say that the agreement has not caused any alienation. But, that is only on paper and not in reality and, in any case, it definitely creates an encumbrance or burden on the property. Moreover, the second part of the restrictions imposed by the Hon.'ble Supreme Court are also clearly flouted inasmuch as the property is no longer kept free and available for discharging the liabilities which would flow subsequently to ONGC. The applicant must show that the consideration and objects of the agreement are lawful and the same are not forbidden by law including a court order. They have failed in the same.

37. Thus, as discussed above, in the facts of the present case, the agreements have been entered into in flagrant violence of the injunction granted by the Hon.'ble Supreme Court and in complete breach of the provisions of the Companies Act. In view of the above discussion, the various authorities cited by Mr.Chudgar, firstly, relying upon the provisions of the Bombay Tenancy and Agricultural Lands Act and, secondly, to contend that the present agreement is at the most voidable, can be of no avail. Besides, in the two cases concerning Section 43 (1) of the Bombay Tenancy and Agricultural Lands Act, the learned single Judges were concerned with the interpretation of the particular section. In the present case, we are not concerned with the interpretation of any statute but with the order passed by the Supreme Court and this is also on the background that when the Supreme Court has in three different occasions passed clear and consistent orders.

In the two cases under the Bombay Tenancy and Agricultural Lands Act, the question was as to whether sale can be entered into before obtaining sanction of the Collector and whether possession of the person on the basis of an agreement without prior sanction is illegal. These questions arose concerning interpretation of this specific section 43 (1) of the Act in the facts of those cases. As stated above, in the present case, we are not concerned with any statutory interpretation. What is sought to be canvassed is that in spite of the injunction initially granted by the Hon.'ble Supreme Court, the agreement entered into in violation thereof is not a void one but a voidable one and the company should be directed to act in accordance therewith. What is sought to be done is to interpret the order of the Supreme Court in a convenient way. As stated above, we are not concerned with statutory interpretation herein. We are concerned with the successive orders in the facts of this very case which are very clear and which leave no room for any such interpretation as is sought to be canvassed. For the same reason, there can be no quarrel with the proposition in the judgment of the Hon.'ble Supreme Court in the case of NATHULAL v. PHOOLCHAND (supra) wherein also, the court was concerned with the interpretation of Section 70 (8) of the Madhya Bharat Land Revenue Act and wherein the Hon.'ble Supreme Court held that permission of the authority concerned can be obtained subsequently. Here, in the facts of the present case, when the Supreme Court passed injunction earlier and subsequently rejected the request of seeking/ permitting transfer of assets, the concerned order decided the controversy finally between the parties and they cannot be permitted to reagitate the issue once again.

38. Similar is the position with respect to the other authorities with respect to voidability cited by Mr.Chudgar. These authorities are sought to be relied upon with respect to breach of injunction of the court's order and the effect thereof. In LAL CHAND v. SOHAN LAL reported in AIR 1938 Lahore 220, a completed sale in contravention of injunction was held not be a nullity in the facts of that case. In DHARAMCHAND v. MITSUI BUSSAN KAISHA & CO. reported in AIR 1920 Nagpur 12, a sale in ignorance of the order of injunction was held only to be irregular in the facts of that case. Similarly, in the case of PRANAKRUSHNA v. UMAKANTA PANDA reported in AIR 1989 Orissa 148, a sale in ignorance of the order of temporary injunction was held to be voidable. In DALBARA SINGH v. CHHAJA SINGH reported in AIR 1992 Punjab & Haryana 237, in the facts of that case, the Punjab & Haryana High Court took view that sale in breach of an

injunction was not rendered nullity but the vendor was only liable for penal consequences. In KUSUMA DEI v. MALATI reported in AIR 1969 Orissa 195, in the facts of that case, sale of property during injunction period was held not to be nullity. What is relevant to note is that all these authorities are concerning concluded sales. In the present case, admittedly, conveyance is not effected. In the facts of the present case, that course of action is not available also for the reason that the application of the applicant seeking/ permitting alienation of the property was rejected by the Hon.'ble Supreme Court when it rejected Interlocutory Application (number not provided by the Applicant) in Civil Appeal No.8530-40 of 1983. The facts of Andhra Pradesh judgment in the case of ADAPA VITTAL v. GOVULA RAMAKISTIAH reported in AIR 1969 Andhra Pradesh 167 are quite different. In that case, on facts, the court held that there was no breach of injunction and hence that authority has otherwise also no application to the facts of the present case.

39. The agreement will also have to be considered as opposed to public policy inasmuch as no such agreement can be permitted which is contrary to and violative of the injunction and the undertaking given to the court, much less the Hon.'ble Supreme Court of India. The two judgments cited by Mr.Chudgar concerning public policy do not help him. In GHERULAL PARAKH V. MAHADEODAS MAIYA reported in AIR 1959 Supreme Court 781, the Supreme Court was concerned with wagering contract. The Hon.'ble Supreme Court held that though wager was void, it was not forbidden by law and in that context the Supreme Court observed as under:

"There is no definite head or principle of public policy evolved by Courts or laid down by precedents which would directly apply to wagering contracts. Even if it is permissible for Courts to evolve a new head of public policy under extraordinary circumstances giving rise to incontestable harm to the society, wager is not one of such instances of exceptional gravity, for it has been recognized for centuries and has been tolerated by the public and the State alike".

In KEDAR NATH MOTANI V. PRAHLAD RAI reported in AIR 1960 Supreme Court 213, The Hon.'ble Supreme Court observed that it is necessary to see as to whether there was a conspiracy to defraud third parties and whether the illegality goes to the root of the matter. One does not know how this authority in any way helps the applicant.

The Hon.'ble Supreme Court in this matter observed: "A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by mis-stating the facts". In the facts of the present case, the aforesaid observations will, in fact, apply with full force against the applicant and the attempt to enforce the agreement in violation of court's injunction and statutory provisions and then to rescind it will have to be held as opposed to public policy.

40. Then, there is another aspect of the matter, as to whether the consideration or the object of the agreement is of such a nature that, if permitted, it would defeat any specific statutory provision. Section 293 (1) (a) reads as under:

"293 Restrictions on powers of Board (1) The Board of Directors of a public company, or of a private company which is a subsidiary of a public company, shall not except with the consent of such public company or subsidiary in general meeting --

(a) sell, lease or otherwise dispose of the whole, or substantially the whole of the undertaking of the company, or where the company owns more than one undertaking, of the whole or substantially the while, of any such undertaking".

Section 173 reads as under:-

"173 Explanatory statement to be annexed to notice- (1) For the purposes of this section -
(a) in the case of an annual general meeting, all business to be transacted at the meeting shall be deemed special, with the exemption of business relating to (i) the consideration of the accounts, balance sheet and the reports of the Board of directors and auditors, (ii) the declaration of a dividend, (iii) the appointment of directors in the place of those retiring, and (iv) the appointment of, and the fixing of the remuneration of the auditors, and

(b) in the case of any other meeting, all business shall be deemed special.

- (2) Where any items of business to be transacted at the meeting are deemed to be special as aforesaid, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning each such item of business, including in particular the nature of the concern or interest, if any, therein, of every director, and the manager, if any;

Provided that where any item of special business as aforesaid to be transacted at a meeting of the company relates to, or affects, any other company, the extent of shareholding interest in that other company of every director and the manager, if any, of the first mentioned company shall also be set out in the statement if the extent of such shareholding interest is not less than twenty per cent of the paid-up share capital of that other company.

- (3) Where any item of business consists of the according of approval to any document by the meeting, the time and place where the document can be inspected shall be specified in the statement aforesaid."

Section 293 (1) (a) of the Companies Act requires a company not to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company except with the consent of the public company in its general meeting. That consent is to be obtained after informing the shareholders accordingly in the meeting to be held for that purpose. Any such business would be a special business under Section 173 (1) (b) of the Companies Act and where such a business is to be transacted, it is mandatory that a statement setting out the material facts concerning each such item of business (including any opportunity, nature of the concern or interest, if any therein, of any director and the manager, if any) is to be annexed to the notice of the meeting. That is the requirement of Section 173 (2) of the Act. As seen above, although a meeting was called, the shareholders were completely kept in dark of the order passed by the Supreme Court restraining any such disposition of property and requiring that the property should be kept intact and available for clearing the dues of ONGC.

41. As far as the requirements of Sections 173 and 293 (1) (a) are concerned, they have long been held to be mandatory in S.M.GANAPAT RAM v. SHRI SAYAJI JUBILEE COTTON & JUTE MILLS CO. LTD. reported in (1964) 34 Company Cases 777. Hon.'ble Justice Bhagwati (as he then was in this court) dealt with an almost identical contract and after considering the submissions made by rival parties held as follows:

" It is, therefore, clear that regard must be had to the whole scope and purpose of the statute for the purpose of determining whether the statute is mandatory or directory. Judged by that test, the conclusion is irresistible that section 173 enacts a provision which is mandatory and not directory. The object of enacting section 173 is to secure that all facts which have a bearing on the question on which the shareholders have to form their judgment are brought to the notice of the shareholders so that the shareholders can exercise an intelligent judgment. The provision is enacted in the interests of the shareholders so that the material facts concerning the item of business to be transacted at the meeting are before the shareholders and they also know what is the nature of the concern or interest of the management in such item of business, the idea being that the shareholders may not be duped by the management and may not be persuaded to act in the manner desired by the management unless they have formed their own judgment on the question after being placed in full possession of all material facts and apprised of the interest of the management in any particular action being taken. Having regard to the whole purpose and scope of the provision enacted in section 173, I am of the opinion that it is mandatory and not directory and that any disobedience to its requirements must lead to nullification of the action taken. If, therefore, there was any contravention of the provisions of section 173, the meeting of the company held on 5th September 1961, would be invalid and so also would be the resolution passed at that meeting be invalid".

The above observations were also quoted with approval by Madon, J. (when he was in Bombay High Court) in FIRESTONE TYRE & RUBBER CO. v. SYNTHETIC & CHEMICALS LTD. reported in (1971) 41 Company cases 377 at page 436. That was in the context of the shareholders not being made aware that a particular director had an

interest or concern in the contract of appointment of a private company for further term. The company had not placed that fact at any time before the shareholders. The learned Judge held the provisions of Section 173 (2) of the Companies Act to be a mandatory one. Earlier on page 435 of the said report, the learned Judge observed "The object underlining Section 173 (2) is that the shareholders may have before them all facts which are material to enable them to form a judgment on the business before them. Any fact which would influence them in making up their mind one way or the other would be a material fact under Section 173 (2)." This view regarding mandatory nature of Section 173 (2) of the Act has also been taken by the Division Bench of the Calcutta High Court in SHALAGRAM JHAJHARIA v. NATIONAL CO. LTD. reported in (1965) 35 Company Cases 706, which was a case of a resolution to approve under Section 294 the appointment of a sole selling agency. In that case, Mitter, J. observed: "As the Legislature has thought it fit, to provide that shareholders must approve of the appointment of a selling agent, the opportunity given to the shareholders must be full and complete and there must be a full and frank disclosure of salient features of the agency before the shareholders can be asked to give their sanction." The same view has been reiterated recently by a single Judge of Madras High Court in the case of V.G. BALASUNDARAM v. NEW THEATRES CARNATIC TALKIES PVT. LTD. reported in (1993) 77 Company Cases 324. At page 349, the learned Judge has observed as follows:

" Section 173 of the Act deals with the explanatory statement to be annexed to the notice. The appointment of directors can be under two circumstances: (a) directors retiring by rotation or being reappointed. In that case, no explanatory statement is required. The object of enacting section 173 is to secure that all facts which have a bearing on the question on which the shareholders have to form their judgment are brought to the notice of the shareholders so that the shareholders can exercise an intelligent judgment. The provision is enacted in the interests of the shareholders so that the material facts concerning the item of business to be transacted at the meeting are before the shareholders and they also know what is the concern or interest of the management in any item of business, the idea being that the shareholders may not be duped by the management and may not be persuaded to act in the manner desired by the management unless they have formed

their own judgment on the question after being placed in full possession of all the material facts and apprised of the interest of the management in any particular action being taken".

It is relevant to note that the learned Judge has followed the law laid down by the single Judge of this court in the earlier mentioned judgment and concurred with it in its entirety. Thus, when a resolution is passed without disclosing material facts in the explanatory statement in flagrant violation of the requirement of Section 173 of the Companies Act, it cannot be said to be anything but a void resolution and an agreement on the strength of a void resolution if permitted would defeat the provisions of law. As observed in SHRI SAYAJI JUBILEE MILLS CASE (supra), such a resolution would be invalid and the meeting would also be invalid and thus the entire action based on that would be void. The learned Judge of the Madras High Court has called such a meeting as virtually an 'ex parte meeting'.

42. With respect to the submission that the agreement is void because it is forbidden by law and law includes orders passed by a competent court, Mr. Shah relied upon a judgment of the full bench of the Allahabad High Court in the case of ABDUL HAMEED v. MOHD. ISHAQ reported in AIR 1975 Allahabad 166 wherein the court held:

" On the application of the principles contained in the definitions in Sec.3 (29), General Clauses Act, 1898 and Art. 13 (3) read with Art. 366 (10) of the Constitution of India, it can safely be laid down that the term 'law' includes an order by a competent authority having the force of law. Consequently, where any agreement is forbidden by an order of the competent authority having the force of law, it shall be an agreement forbidden by law as contemplated by Sec. 23 of the Contract Act."

Such an agreement is one where the object or consideration is forbidden by law or is of such nature that if permitted it would defeat the provisions of any law or is opposed to public policy. The said agreement in respect of disposing of the immovable assets of the company was forbidden by an injunction of the Hon.'ble Supreme Court dated 15.4.1987 and if such an agreement is permitted it would be opposed to public policy inasmuch as it would encourage defeating and violating injunction and mandatory orders of the highest court of the land and will also encourage violating solemn undertaking given to

the highest court of the land. Such an agreement is void under Section 23 read with Section 24 of the Contract Act. Section 23 of the Contract Act reads as under:

"23. The consideration or object of an agreement
is lawful, unless -

it is forbidden by or; or

is of such a nature that, if permitted,
it would defeat the provisions of any
law, or is fraudulent; or involves or
implies injury to the person or property
of another, or the court regards it as
immoral, or opposed to public policy.

In each of these cases, the consideration
or object of an agreement is said to be
unlawful. Every agreement of which the
object or consideration is unlawful is
void."

Section 24 of the Contract Act reads as under:

"24. Agreements void, if considerations and
objects unlawful in part - If any part of a
single consideration for one or more objects, or
any one or any part of any one of several
considerations for a single object, is unlawful,
the agreement is void."

43. Mr. Shah submitted that the agreement dated
2.11.1989 was void also on account of the provisions of
Section 536 (2) read with Section 441 (2) of the
Companies Act. Section 536 (2) reads as under:

"536 (2) - In the case of a winding up by or
subject to the supervision of the court, any
disposition of the property (including actionable
claims) of the company, and any transfer of
shares in the company or alteration in the status
of its members, made after the commencement of
the winding up, shall, unless the court otherwise
orders, be void".

Section 441 of the Act reads as under:

"441 - Commencement of winding up by court - (1)
Where, before the presentation of a petition for
the winding up of a company by the court, a
resolution has been passed by the company for

voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

- (2) In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up."

This Hon.'ble Court (Coram: S.D.Pandit,J.) by its order dated 17.1.1997 passed in various company petitions including Company Petition No.66 of 1988 directed the company to be wound-up. The Company Petition No.66 of 1988 was filed on 12.4.1988. Thus, the winding up is deemed to have commenced on 12.4.1988 under the provisions of Section 441 (2) of the Act. This Court (Coram: H.L.Gokhale, J.) by its judgment and order dated 26.11.1998 passed mainly in Company Applications Nos.99 of 1998 and 524 of 1997 also held that the winding up of the Company commenced on 12.4.1988. The disposition sought to be made of the undertaking of the company pursuant to the agreement dated 2.11.1989 being subsequent to the commencement of the winding up is void under section 536 of the Act and no leave has been sought as contemplated under Section 536 (2) till this date.

44. In view of what is stated above, the agreement dated 2.11.1989 is void ab initio and no rights can flow from such an agreement. The Civil Suit No.4780 of 1995 is filed for claiming damages for alleged breach of contract by the company entered through the Board of Directors. However, the alleged contract being not a contract at all but being merely a void agreement (a contract is an agreement enforceable at law and an agreement which is not enforceable at law remains merely an unenforceable void agreement not acquiring the status of a contract), no rights flow from such a void agreement and no suit for damages can be filed and if filed, can be ever permitted to be proceeded with.

45. Mr.Shah then submitted that assuming without admitting that the said agreement dated 2.11.1989 had become voidable or that the applicant was defrauded by the company, no fresh suit for 'damages or compensation for breach of the contract' can be filed after passing of the winding up order and if the same is pending on the date of passing of the winding up order, nor can the same

be permitted to be proceeded further under Section 446 of the Act. Mr. Shah submitted that a suit for damages is not like a suit for unpaid price of goods sold or a similar suit. In a suit for damages the court has to examine whether there is any breach of contract, whether on account of such breach of contract the plaintiff has suffered any actual damage and has to assess actual damage and only when a decree for damages is passed, the debt comes into existence. When a company is being wound up, its assets and liabilities have to be frozen as on the date of the winding up order and assets have to be realised by the Liquidator and distributed amongst various creditors and employees as on the date of the winding up order and as per the scheme of distribution prescribed under the Act. No new rights or debts can be created after the date of winding up order and no incomplete rights can be permitted to be completed after the date of winding up order. The status of the creditors of the company which can be recognised is that which existed on the date of the winding up. In the present case, on the date of the winding up order, the applicant was not a creditor of the company. If at all it can be a creditor of the company in respect of damages for alleged breach of contract it can become a creditor only when a decree for damages is passed. At present there is no decree for damages and any decree for damages that may be passed after the date of winding up order is not permissible since it would amount to creating new rights or completing incomplete rights and the same is not permissible under the scheme of the Act relating to winding up. The present claim being admittedly for damages and compensation for alleged breach of contract and not for any debt existing on the date of winding up order the same is not maintainable and cannot be permitted to be proceeded with further. The submission of Mr. Shah is well-taken. A claim for damages for breach of contract is not a claim for an ascertained amount or for amounts presently due and payable. With respect to the nature of a suit for damages, way back in the case of *IRON & HARDWARE INDIA COMPANY v. SHAMLAL AND BROS.* reported in AIR 1954 Bombay 423 Chagla C.J. stated the law on this issue as follows;

"In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.

As already stated, the only right which he has is

the right to go to a Court of law and recover damages. Now, damages are the compensation which a court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the court is doing is ascertaining a pecuniary liability which already existed. The court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant."

The Hon.'ble Supreme Court in the case of UNION OF INDIA v. RAMA IRON FOUNDRY reported in AIR 1974 SC 1265 quoted these observations with approval and added on page 1273 (of AIR):-

"This statement in our view represents the correct legal position and has our full concurrence. A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable."

46. Again, in the context of winding up order in J.K.(Bombay) PVT. LTD. v. NEW KAISER-I-HIND SPG. & WVG. CO. LTD. reported in 1970 (40) Company Cases 689, the Hon.'ble Supreme Court held:

"The effect of a winding-up order is that except for certain preferential payments provided in the Act the property of the company is to be applied in satisfaction of its liabilities pari passu. Pari passu distribution is to be made in satisfaction of the liabilities as they exist at the commencement of the winding-up (of secs.528 and 529 of the Act; Ghosh on Indian Company Law, 11th Ed., Vol.2, p.1073). The effect of a winding-up order on rights already completed as against rights yet to be completed is succinctly stated by Lord Halsbury in Bank of Scotland v. Macleod as follows:

"Rights in security which have been effectually completed before the liquidation must still receive the effect which the law gives to them. But the company and his liquidators are just as completely disabled by the winding-up from granting new or completing imperfect rights in security as the individual bankrupt is by his bankruptcy."

The Hon.'ble Supreme Court later observed in the same judgment:

"It is thus well established that once a winding-up order is passed the undertaking and the assets of the company pass under the control of the liquidator whose statutory duty is to realise them and to pay from out of the sale-proceeds its creditors. Such creditors acquire on such order being passed the right to have the assets realised and distributed among them *pari passu*. No new rights can thereafter be created and no uncompleted rights can be completed, for doing so would be contrary to the creditors' right to have the proceeds of the assets distributed among them *pari passu*."

47. Thus, the position is clear that once a winding up order is made, no permission can be granted under Section 446 of the Act which has the effect of creating new rights or to completing of incomplete rights. That is what is precisely sought to be done in the proposed suit. The proposed suit is not for any crystallised or ascertained amounts. In para 58 of the plaint (which is quoted above) it is very clearly stated that the plaintiff has been unable to ascertain the amount of compensation recoverable as claimed by them. It is clearly a claim for an unascertained amount. Such a suit for an incomplete right cannot be permitted to be proceeded.

48. The next submission of Mr.Shah was that, when a person at whose option a contract was sought to be avoided wants to rescind it, he must restore the benefits received by him under the contract to the person from whom it was received. That is also the mandate of section 65 of the Contract Act. Mr.Shah submitted that if the party seeking rescission of a voidable contract is not in a position to restore the former state of things, it cannot be permitted to rescind the contract. The submission of Mr.Shah is well-taken. One cannot

approve as well as reprobate at the same time. In the present case the Applicant was put in possession of the Unit No.2 way back in December 1989. The applicant used and enjoyed the entire Unit No.2 for almost seven years; during the said period it demolished and disposed of several machines and caused depreciation in the value of the machines etc. The applicant while rescinding the contract cannot return to the company the benefits that it received under the said contract during these seven years. Under such circumstances, rescission is not permitted and the alleged rescission of the contract by the applicant on 25.1.1995 is illegal and no rights flow from such rescission and a suit based on such rescission is per se not maintainable.

49. Mr.Shah then submitted that assuming that the agreement had become voidable, one has to avoid it at the earliest and in any case within a reasonable time after coming to know of the fact that some deception had been practised upon it and that it was necessary to avoid it. According to the applicant (as stated in the plaint of Civil Suit No.4780 of 1995), it was defrauded and deceived by the company to enter into the agreement dated 2.11.1989 inasmuch as the company had not disclosed to it the existence of the Hon.'ble Supreme Court's injunction as also of the undertaking given by the company to the Hon.'ble Supreme Court and consequently, according to the applicant, the agreement was voidable; that it came to know of the said injunction and the said undertaking only in September 1992 (when the Annual Report of 1991-92 became available) and that after making various efforts before the BIFR and the Hon.'ble Supreme Court to get the conveyance executed and the said efforts having failed, it rescinded the "contract" on 25.1.1995. Mr.Shah pointed out that after it became aware of the alleged fraud and misrepresentation, the applicant made an Application on 15.3.1993 to the BIFR to be permitted to participate in the proceedings; the company made (to the knowledge of the present applicant) an application in July 1993 to the Hon.'ble Supreme Court seeking its permission to execute the conveyance and the said application was rejected by the Hon.'ble Supreme Court by its order dated 10.8.1993 (para 34 of the plaint). Another application was made by the company (again to the knowledge of the present applicant) to the Hon.'ble Supreme Court in January 1994 but the same was also rejected by the Hon.'ble Supreme Court (para 36 of the plaint). The applicant itself also made an application to the Hon.'ble Supreme Court in May 1994 for permission to transfer Unit No.2 to the applicant. The said application was also rejected by the Hon.'ble Supreme

Court by its order dated 9.1.1995 (para 37 of the plaint) (No copy of the application of the Hon.'ble Supreme Court's order is produced by the applicant). Mr.Shah submitted that when three applications (including the one made by the present applicant itself) were made, the present applicant was aware of the alleged misrepresentation and fraud; however, instead of exercising its option to avoid the contract it affirmed the said agreement by its conduct inasmuch as permission of the Hon.'ble Supreme Court was sought to execute the conveyance pursuant to the said agreement. No application for permission to execute the conveyance could have been made unless the validity of the agreement dated 2.11.1989 was affirmed (and not avoided) by the present applicant. The present applicant having thus affirmed and approbate the agreement cannot be permitted to later on reprobate the contract or avoid it.

50. In my view, this submission of Mr.Shah deserves to be accepted also for the reason that certain limits to the rights to rescind have come to be accepted in the field of law of contract. Anson in his Principles of English Law of Contract has observed in this behalf as follows:

" The remedy of rescission is common to all classes of operative misrepresentation. When a person has been induced to enter into a contract by a misrepresentation of any description, the effect on the contract is not to make it void, but to give the party misled an option, either to avoid it, or, alternatively, to affirm it. If the party misled elects to avoid the contract, he may take steps to have it set aside by the courts; or he may resist an action for specific performance, or for damages, brought against him in respect of the contract. But this option to affirm or avoid will be lost in certain events, the law having laid down certain limits to the right to rescind. First, if after becoming aware of the misrepresentation he affirms the contract either by express words or by an act which shows an intention to affirm it, rescission cannot be obtained. So, for example, if a person who has purchased shares on the faith of a misrepresentation subsequently becomes aware of its falsity, but neglects to remove his name from the register of shareholders, or accepts dividends paid to him, he will not be permitted to avoid the contract."

51. The substance of the suit and the present Application is that had the company performed its agreement/s and executed the conveyance, the Applicant would not have any claim against the company. Thus, in effect almost the entire claim of the Applicant is based on or arising out of the alleged non performance of the agreement/s. The claims of the Applicant are in the nature of compensation or damages for the alleged breach of contract or arising from avoidance of a contract which is alleged to be voidable. As observed earlier herein, the agreements were void ab initio and no rights can flow from them. A suit which is mainly for compensation or damages against a company in liquidation will create, if at all, a liability only when a decree is passed which will obviously be subsequent to the date of passing of the winding up order. As observed earlier, after the passing of a winding up order no new rights can thereafter be created and no incomplete rights can be completed. Permitting the Applicant to proceed with such a suit which has no substance at all and is based on patently void agreements would expose the company in liquidation to unnecessary litigation and unnecessary costs. Such course cannot be permitted under Section 446 of the Act.

52. With respect to the submission of Mr.Nanavati that the applicant is required to face the suit filed by Shri Ambica Mills Ltd. wherein the prayers have been made to the effect that the applicant be directed to continue to run the Unit No.2, Mr.Shah on instructions of the Official Liquidator has made a statement that the said suit has become infructuous and now there is no occasion of the unit being conducted by afflux of the event. The O.L. will not therefore proceed with that suit any further and withdraw it. This statement obviates the submission of Mr.Nanavati in that behalf. Even with respect to the submission of Mr.Nanavati that there were other defendants in the suit No.4780 of 1995, which was sought to be proceeded by the applicant, Mr.Shah submitted that the O.L. had no objection to the applicant proceeding with that suit against other defendants so long as no prayer is pressed against the company in liquidation and the suit is restricted only with respect to the averments and prayers vis-a-vis. other defendants. Mr.Nanavati was naturally not inclined to accept this offer. Mr.Shah also submitted that the applicant may proceed against the former directors of Shri Ambica Mills Ltd. (now in liquidation) if according to the applicant they practiced any deception as a result of which the applicant had suffered. If the Applicant has any claim in respect of its properties alleged to

have been left at the company's premises (it is not the case of the Applicant that it ever demanded from the company and the company ever refused it to take away its properties) it can lodge its claim for the same with the Liquidator who will decide the same in accordance with law. However, for such a claim, a suit involving avoidable and unnecessary costs cannot be permitted.

53. In view of what is stated above, in my view, leave as sought for cannot be granted.

54. Mr.Vasavada appearing for the Textile Labour Association representing the workmen also supported Mr. Shah's submissions.

55. For the reasons stated above, Prayer (B) for continuation with Civil Suit No.4780 of 1995 pending in the City Civil Court at Ahmedabad instituted by the applicant company against Shri Ambica Mills Ltd. or for transferring that suit to this court for further proceeding therewith is rejected. Consequently, there is no occasion to join the Official Liquidator as a party respondent in that suit which is the prayer in Prayer Clause (A). Accordingly, this Company Application is dismissed.

56. This matter has been on Board for more than 20 times and the Official Liquidator had to engage an advocate and the arguments went on for a number of days. In the circumstances, the applicant will pay costs of Rs.10,000/- to the Official Liquidator. Mr.Nanavati, Senior Advocate with his assistant Mr.Chudgar appearing for the petitioner, Mr.Vasavada appearing for the workmen and particularly Mr.Ashok L.Shah appearing for the Official Liquidator have ably assisted me in deciding the matter and I place on record my appreciation for the assistance rendered by all of them. This application is accordingly disposed of.

(KMG Thilake)

#####